No. 15909

United States
COURT OF APPEALS
for the Ninth Circuit

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellees.

APPELLANTS' REPLY BRIEF

Appeals from the United States District Court for the District of Oregon.

HUTCHINSON, SCHWAB & BURDICK,
DENTON G. BURDICK, JR.
712 Executive Building
Portland, Oregon
Attorneys for Appellants and Cross-Appellees.

C. E. LUCKEY
United States Attorney;
VICTOR E. HARR
Assistant United States Attorney
United States Courthouse
Portland, Oregon
JAMES H. PRENTICE
MORTON HOLLANDER
Attorneys, Dept. of Justice
Washington 25, D. C.
Attorneys for Appellee and Cross-Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-58

No. 15909

United States
COURT OF APPEALS
for the Ninth Circuit

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

W. A. RUSHLIGHT; RAYMOND G. RUSHLIGHT; W. A. RUSHLIGHT COMPANY, a partnership; W. A. RUSHLIGHT, Executor of the Estate of Betty Rushlight, deceased,
Appellees.

APPELLANTS' REPLY BRIEF

Appeals from the United States District Court for the District of Oregon.

REPLY TO THE GOVERNMENT'S ARGUMENT AS TO THE EQUITABLE DEFENSE

The Government argues that the doctrine of the *Bull* and *Stone* cases is inapplicable because (a) appellants have no fixed or specific claim against the Government for their losses (Br. 14, 15), (b) the doctrine of these cases has been so narrowed that they are not

applicable (Br. 15, 16) and (c) the facts alleged in the second defense have no relation to the transaction giving rise to the debt (Br. 17, 18) (*Bull v. United States,* 295 U.S. 247, 55 S Ct 695, 79 L ed 1421; *Stone v.White,* 301 U.S. 532, 57 S Ct 851, 81 L ed 1265).

All of these arguments are at least doubtful. In addition the Government does not even answer our argument, nor distinguish the authorities we have cited, which would deny recovery on an inequitable claim even where there is no specific or fixed cross claim.

(a) Appellants Have An Equitable Cross Claim For Their Losses.

Concededly, appellants do not have an enforceable cross demand for the recovery of their 1944 and 1945 losses on renegotiable war business (any more than the taxpayer had such a claim in the *Bull* and related cases). There, as here, any such claim has long since been outlawed. However, under the War Contracts Hardship Claims Act (Lucas Act) 60 Stat. 902, 62 Stat. 992, 41 U.S.C.A. Sec. 46, Note, Congress recognized that there was a duty on the part of the Government to reimburse war contractors for losses incurred under war contracts or subcontracts. Assuming such a duty, then appellants should, at least in equity, have a cross demand which could be offset against the Government's claim for 1942.

(b) The Doctrine of the Bull and Stone Cases Will Be Applied In An Appropriate Situation.

In the case of *Wells Fargo Bank & Union Trust Co. v. U. S.,* 9 Cir., 1957, 245 F 2d 524, cited by the Government (Br. 16) this court found it unnecessary to determine the extent of the doctrine of equitable recoupment as the Government had a statutory remedy. However, the Second Circuit, quoted by this court (Judge Frank in *Wood v. United States,* 2 Cir., 1954, 213 F 2d 660), has had occasion quite recently to examine and apply this doctrine in the face of arguments similar to those made by the Government in the case at bar. (See *Cuba Railroad v. U. S.,* 2 Cir., 1958, 254 F 2d 280, a recent opinion by Judge Learned Hand which would indicate that there is considerably more vitality to this doctrine than was once supposed.)

(c) The Appellants Renegotiation Liability For The War Years Constitutes a Single Transaction.

On this aspect of the case, the Government's position is entirely too restrictive. In this case we are dealing with (a) a single period, i.e. the war years, (b) one Renegotiation Act ,(c) one partnership, (d) the total renegotiable sales and contracts of such partnership.

The Renegotiation Act itself was purposely made broad enough to encompass any kind of war contract or sales regardless of the underlying product or service. Therefore, under the Act, whether the sales and contracts related to plumbing or steel would be immaterial. The question is whether the appellants realized excessive profits on their war contracts and sales without regard to what the particular product may have been.

(d) Equitable Principles Will Be Applied Even Though Appellants Have No Cross Claim.

It can be argued, as the Government has done, that "recoupment" does not apply because the appellants have no specific claim against the Government. However, even assuming that such is the case, the *Stone* case goes beyond recoupment or set-off and holds that a claim based upon *indebitatus assumpsit* (as the Government's case is here) will not be enforced where it is inequitable to do so.

This distinction is recognized in the discussion of the cases in this area contained in Mertens, Law of Federal Income Taxation, Section 60.05 (chap. 60, page 19) where the author, after discussing the *Stone* case says, "The decisions just referred to are not set-off or recoupment decisions; they are decisions involving the pleading of an *equitable defense.*" (Author's emphasis).

Furthermore, a careful review of the cases that we have cited in our opening brief will reveal that in many of those cases there was no cross claim. The court refused to enforce the Government's claim for money because under all of the circumstances it was unjust and inequitable to do so. In the case at bar, even assuming that there was no duty on the part of the Government to reimburse appellants for their losses, and that appellants have no claim or demand for their recovery, the fact remains that the Government is suing appellants to recover excessive profits when they in fact had *no* profits, excessive or otherwise.

THE GOVERNMENT'S CLAIM FOR INTEREST

Everything that we have said in our opening brief and this brief as to the equities of the Government's position is applicable to the question of whether the lower court abused its discretion in not allowing interest.

As to this aspect of the case, the Government entirely misconstrues the basis on which interest is allowed. However, even under such misconstruction, the lower court was correct in not allowing interest. In its brief, the Government argues that the appellants had the use of the excessive profits and therefore should pay interest on such sum. However, such was not the case as any such profits were immediately wiped out by the losses in the subsequent years. Appellants did not have the use of such money—it was lost in connection with contracts and sales subject to renegotiation.

The applicable rules as to the allowance of interest in a renegotiation case are laid down by this court in *United States v. Bonnell,* 9 Cir. 1950, 180 F 2d 145 as follows:

> " . . . on the merits we agree with the contractors that interest is not automatically allowable, but is to be denied where its recovery would be inequitable . . . not only the allowance or disallowance of interest but also the rate is discretionary with the court, . . ."

The Government takes the position that interest is allowable in every case where the defendant has had the use of the plaintiff's money. That this is a misconception is shown by the case relied upon by this court

in the *Bonnell* case, namely, *Board of County Comm'rs of Jackson County v. United States,* 1939, 308 U.S. 343, 60 S Ct 285, 84 L ed 313, where the court said:

> "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. *It is denied when its exaction would be inequitable.*" (Emphasis supplied).

Respectfully submitted,

DENTON G. BURDICK, JR.,
HUTCHINSON, SCHWAB & BURDICK,

Attorneys for Appellant and
Cross Appellees.